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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1972

NO._____

ENCARNACION SOLIS, JR., AND ARMANDO RODRIGUEZ ALAINIS, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS GILBERT SHARPE, JR.
1010 E. Washington
Brownsville, Texas 78520
Attorney for Petitioners

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on December 14, 1972.

OPINIONS BELOW

The Opinion of the Court of Appeals, issued on December 14, 1972 is in Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

Whether Petitioners were convicted based on evidence that was obtained as a result of an illegal arrest.

STATEMENT OF THE CASE

Petitioners were arrested by agents of the United States Government and subsequently charged with violations of Title 21 U.S.C., Sections 846 and 841 (a)(1). They were convicted and their case was affirmed on appeal (see Appendix A).

Petitioners were arrested without the benefit of an arrest warrant having been issued. They were never connected directly to two anonymous persons who allegedly were in the area to secure marijuana.

Petitioners claim that the circumstances of their arrest were not based on probable cause and further, that said arrest and search was not a "border search", and therefore, *arguendo,* they should have been granted affirmative relief on their Motion to Suppress the Evidence.

Petitioners rely on *Sibron v. New York,* 392 U.S. 40, and *Draper v. United States,* 358 U.S. 307. The Court of Appeals held that the search was not a border search as defined in *United States v. Garcia,* 452 F.2d 419.

Petitioners request that this Court review the opinion below and the record to re-examine the alleged circumstances of the arrest and search, in order that the proper

standard of constitutional law may be applied to the facts.

CONCLUSION

For the reasons given above, a Writ of Certioari should be granted.

Respectfully submitted,

ENCARNACION SOLIS, JR.
ARMANDO RODRIGUEZ ALAINIS
Petitioners

By Thomas Gilbert Sharpe, Jr.

THOMAS GILBERT SHARPE, JR.
1010 E. Washington
Brownsville, Texas 78520

ABEL TOSCANO
302 E. Jackson
Harlingen, Texas
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Petition was this 11th day of January, 1973 mailed to the Solicitor General of the United States and to the United States Attorney for the Southern District of Texas.

Thomas Gilbert Sharpe, Jr.
THOMAS GILBERT SHARPE, JR.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 72-2238
Summary Calender*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ENCARNACION SOLIS, JR., and
ARMANDO RODRIGUEZ ALAINIS,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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(December 14, 1972)

Before WISDOM, GODBOLD and RONEY,
Circuit Judges.

WISDOM, Circuit Judge: Encarnacion Solis, Jr. and Armando Alainis appeal from their convictions for (a) conspiracy to possess marijuana with intent to distribute

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty company of New York, et al, 5 Cir. 1970, 431 F.2d 409, Part I.

it and (b) distribution of marijuana in violation of 21 U.S.C. §§ 846 and 841(a)(1). They contend that the trial court should have suppressed certain evidence obtained as the fruit of allegedly illegal arrests, and that the evidence was insufficient to support their convictions. We affirm.

The events leading to the arrest and conviction of Solis and Alainis began with a call from a concedely reliable informant to a United States customs agent, informing the agent that two young men and one woman had arrived in Harlingen, Texas to pick up a load of marijuana and had left the airport in a taxicab. A check of cab company records revealed that the three suspects had registered at the Rodeway Inn in Harlingen. A telephone call was made from one of the rooms to an unlisted number registered to Francisco Alainis in Weslaco, Texas. Customs agents observed the two men, Crosby and Shiver, leave the motel with four empty suitcases and take a taxicab to Weslaco, where they registered in the Vali-Ho Motel and made a second telephone call to the same number. Alainis and Solis then arrived on the scene in a black Pontiac which one of the agents recognized as belonging to Alainis' family. The agents knew that state charges for marijuana possession were pending against Alainis and Solis. The black Pontiac then left the motel. Half an hour later an Oldsmobile appeared at the motel. One of the agents recognized this as a car often driven by Solis. Crosby and Shiver took several suitcases out of the car, loaded them in the trunk, and drove the car back to the Rodeway Inn in Harlingen. There they were arrested by customs agents, who detected a strong odor of marijuana as Crosby and Shiver were unloading the suitcases from the trunk.

Meanwhile, two agents en route to the Rodeway Inn recognized the black Pontiac heading in the same direction. After being advised by radio that Crosby and Shiver had been arrested and that a large quantity of marijuana had been found in the Oldsmobile, the agents followed the black Pontiac back to Harlingen. There the agents saw the Pontiac drive slowly around the Rodeway Inn. The agents proceeded to arrest the occupants of the car, who proved to be Alainis and Solis. A search of their persons revealed marijuana sweepings.

The appellants contend that they were illegally arrested, and that all evidence discovered by the search at the time of the arrest should have been excluded.[1]

We held that the search of the appellants was a search incident to a lawful arrest based on probable cause.[2]

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1. The appellants also object to the arrest and search of their codefendants Crosby and Shiver. Some authorities state that defendants should have standing to object to searches of their codefendants in all cases. People v. Martin, 1955, 45 Cal.2d 755, 290 P.2d 855; ALI Model Code of Pre-Arraignment Procedure § SS 290.1(5)(d) & Comment (Official Draft No. 1, 1972). We are constrained to hold, however, that the appellants have no standing to complain of the search of Crosby and Shiver. Alderman v. United States, 1969, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176; United States v. James, 5 Cir. 1970, 432 F.2d 303; United States v. Grimes, 5 Cir. 1970, 426 F.2d 706; Matthews v. United States, 5 Cir. 1969, 407 F.2d 1371, cert. denied, 1970, 398 U.S. 968, 90 S.Ct. 2177, 26 L.Ed.2d 554; Granza v. United States, 5 Cir. 1967, 377 F.2d 746, rehearing denied, 5 Cir. 1967, 381 F.2d 190, cert. denied, 1967, 389 U.S. 939, 88 S.Ct. 291, 19 L.Ed.2d 292.

2. The government argues that the search of the appellants was a "border search," which may be constitutionally justified if the officers conducting the search are within their jurisdiction and have "reasonable cause to believe that a person is carrying merchandise unlawfully introduced into the United States." United States v. Garcia, 5 Cir. 1971, 452 F.2d 419, 421; see United States v. Poindexter, 5 Cir. 1970, 429 F.2d 510; Morales v. United States, 5 Cir. 1967, 378 F.2d 187; Valdez v. United States, 5 Cir. 1966, 358 F.2d 721.

Probable cause is sufficiently shown where " 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Draper v. United States*, 1959, 358 U.S. 307, 313, 79 S.Ct. 329, 3 L.Ed.2d 327, quoting *Carroll v. United States*, 1925, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543.

The mere fact that Alainis and Solis were seen in association with Crosby and Shiver does not of itself constitute probable cause. See *Sibron v. New York*, 1968, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917. But the arresting officers knew much more than this. Based on a reliable tip, they knew that Crosby and Shiver had come to Texas for the very purpose of effecting a rendevous with someone in order to obtain marijuana. They knew that Alainis and Solis had prior arrests for drug offenses. The evidence available to the officers at the time of the arrest indicated that Alainis and Solis were the only persons with whom Crosby and Shiver had had contact since their arrival in Texas. Only two cars

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"Reasonable cause" is a lesser standard than probable cause. See *Garcia*, supra; Thomas v. United States, 5 Cir. 1967, 372 F.2d 252. It is true that the site of the search in this case, fifteen miles from Mexico, may be considered to be within a "border area." See Walker v. United States, 5 Cir. 1968, 404 F.2d 900 (45 miles); Ramirez v. United States, 5 Cir. 1959, 263 F.2d 385 (75 miles). It is also true that to justify a border search the government need not necessarily show that the persons searched have themselves crossed an international boundary. *Garcia*, supra; United States v. Hill, 5 Cir. 1970, 430 F.2d 129. But in the present case the agents had no reason whatever at the time of arrest to suspect that the marijuana which they expected to find had been unlawfully imported into the United States from a foreign country. Thus the search of the appellants cannot qualify as a border search under the standard of *Garcia*.

had appeared at the motel room: the Pontiac, which the agents knew Alainis often drove, and the Oldsmobile, in which the agents had often seen Solis. Solis had apparently loaned Crosby and Shiver the Oldsmobile, in which they were arrested and found to be carrying a large quantity of marijuana. Added to these facts was the suspicious behavior of Alainis and Solis when they arrived at the Rodeway Inn, where they drove slowly around the motel. All the evidence which the officers had knowledge of pointed strongly to the conclusion that Alainis and Solis had engaged in a criminal transaction with Crosby and Shiver. The officers therefore had probable cause to arrest the defendants and to conduct the search which revealed marijuana sweepings on their persons.

Alainis and Solis also object that the evidence was insufficient to support their conviction, since the evidence was circumstantial. We find this contention without merit. Direct evidence is seldom obtainable to prove conspiracy, since conspiratorial agreements are usually reached in secret. Of necessity conspiracy convictions must often be based on inferences drawn from circumstantial evidence. *United States v. Warner*, 5 Cir. 1971, 441 F.2d 821; *Lacaze v. United States*, 5 Cir. 1968, 391 F.2d 516; *Gordon v. United States*, 5 Cir. 1971, 438 F.2d 858.

The judgment of the district court is AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-987

ENCARNACION SOLIS, JR. AND ARMANDO RODRIGUEZ ALANIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial in the United States District Court for the Southern District of Texas, petitioners were convicted of having distributed marijuana and having conspired to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. The court of appeals affirmed (Pet. App. A).

Petitioners' sole contention is that there was a lack of probable cause for their arrest and that the search incident thereto was thus invalid. This contention is answered in the opinion below which fully sets forth the pertinent facts. In urging that the petition for a

writ of certiorari should be denied, we rely upon this opinion (Pet. App. A 1–5).

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973